

IN THE MATTER OF
FMC CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 8961. Complaint, Apr. 8, 1974-Decision, Oct. 8, 1975

Consent order requiring a Chicago, Ill., producer and distributor of pesticides, among other things to cease misrepresenting their products as being absolutely or unqualifiedly safe, non-toxic or free of hazard under conditions of normal use to human beings, warm-blooded animals, birds, fish, beneficial insects, or the environment.

Appearances

For the Commission: *Paul L. Chassy, Miriam A. Bender and Eugene Kaplan.*

For the respondents: *Thomas J. Whitehead, McKean, Whitehead & Wilson, Wash., D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that FMC Corporation, a corporation, hereinafter referred to as respondent, has violated provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the order attached hereto, the following definitions of terms shall apply:

(1) "Pesticide" refers to (a) any substance or mixture of substances, including insecticides, intended for preventing, destroying, repelling or mitigating any pest, and (b) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.

(2) "Insecticide" refers to any substance or mixture of substances

intended for preventing, destroying repelling or mitigating any insects which may be present in any environment whatsoever.

(3) "Phosphate insecticides" refers to those insecticides belonging to the organic phosphorous chemical class.

(4) "Labeling" refers to all labels and other written, printed, or graphic matter (a) accompanying the pesticide at any time, or (b) to which reference is made on the label or in literature accompanying the pesticide where warnings, cautions, directions or limitations for the pesticide's use appear.

PAR. 2. FMC Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1105 Coleman Ave., in the city of San Jose, State of California.

PAR. 3. Respondent is now, and for some time last past has been, through its Agricultural Chemicals Division (formerly Niagara Chemical Division), engaged in the production, formulation, advertising, offering for sale, sale and distribution of pesticides designated as "Furadan," "Thiodan," "Ethion," "Sincox," "Polyram" and other pesticide products to formulators, distributors, retailers, for resale to the public, and to the public.

PAR. 4. In the course and conduct of its business as aforesaid respondent now causes, and for some time last past has caused the said products, when sold, to be transported from its place of business in one State of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its said business, and for the purposes of inducing the purchase of Furadan, Thiodan, Ethion, Sincox, Polyram, and other pesticide products, respondent has made, and is now making, alone or in cooperation with others, orally or in writing, numerous statements and representations concerning the safety and efficacy of said products, which are disseminated in advertisements in print and broadcast media, in promotional materials and by other means. Such statements and representations include, but are not limited to, the following:

Furadan:

- (1) Safe to use.
- (2) Furadan granules are safe to handle.
- (3) Furadan * * * is safe to handle in comparison to other products.
- (4) Furadan is easy to use * * * Safer for the operator, too.
- (5) Furadan * * * is less hazardous than most other rootworm insecticides.

(6) Furadan presents less hazards to the user than many pesticides commonly used today.

(7) Fear no weevil * * * Use Furadan * * * And fear no more.

(8) Furadan Toxicity. Furadan 10 Granules have been found less hazardous than many other accepted pesticides in common use. Furadan is not readily absorbed through the skin, as shown by the dermal LD50 (10, 500mg/kg) rating. Care should be taken, however, to avoid rough handling which can powder material off the granules and create a slight hazard. Even so, a wide margin exists between the dose that will cause mild symptoms and that which will cause serious illness. The effects, also, are spontaneously reversible in a few hours and there is no cumulative toxicity.

Thiodan:

(1) Thiodan-safe to use.

(2) Thiodan * * * has a remarkable record of safety.

(3) Thiodan controls them all — safely.

(4) Thiodan is preferred because of its moderate toxicity - not like hazardous phosphate compounds * * *

(5) * * * low toxicity to bees and other insect predators.

(6) Growers can expect to use Thiodan without severe damage to bees * * *

(7) Easy to use * * * easy to handle.

(8) Thiodan is itself classed as "moderately toxic." When used in combination with Parathion sprays, normal safe handling precautions should be followed.

Ethion:

(1) Ethion when used in accordance with directions, is safe to the applicator.

(2) Ethion formulations are safer to use than many other pesticides.

Sinox:

(1) SINOX PE is a pre-emergence spray material which is both safe and highly effective * * *

Polyram:

(1) Polyram * * * A safe, sure fungicide for dependable, consistent control of * * * blight.

(2) Polyram * * * It's non-hazardous and requires no special clothing or safety equipment.

(3) Polyram is safe to use * * *.

PAR. 6. Through the use of statements and representations as alleged in Paragraph Five hereof, respondent has represented and is now representing, directly or by implication, that:

(1) Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products are safe, non-toxic, hazard-free products.

(2) Thiodan is relatively more safe in all respects than all phosphate insecticide products on the market.

(3) Furadan and Ethion are relatively more safe in all respects than many or most other insecticide products on the market.

PAR. 7. In truth and in fact:

(1) Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products are not safe, non-toxic, hazard-free products as represented by respondent.

(2) Thiodan is not relatively more safe in all respects than all phosphate insecticide products on the market.

(3) Furadan and Ethion are not relatively more safe in all respects than many or most other insecticide products on the market.

Therefore, the statements and representations as alleged in Paragraph Five hereof were, and are, deceptive.

PAR. 8. By making statements and representations, alone or in cooperation with others, orally or in writing, which appear in advertisements in print or broadcast media, in promotional material and by other means, about Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products in a manner which is inconsistent with or disregards warnings, cautions, limitations and instructions for use found in labeling, respondent negates the import and purposes of and detracts from the effectiveness of such warnings, cautions, limitations or instructions.

Therefore, the advertisements, other promotional materials, acts and practices which contain the statements and representations referred to in Paragraph Eight above are unfair or deceptive.

PAR. 9. In the further course and conduct of its business as aforesaid, respondent has made statements and representations, alone or in cooperation with others, orally or in writing, which appear in advertisements in print and broadcast media, in promotional material or by other means, about Furadan, Thiodan, Ethion, Sinox, Polyram and other pesticide products without disclosing that such products are hazardous. Knowledge of the hazards associated with the use of such products would enable and encourage consumers to exercise the proper degree of care in using them.

Thus, respondent has failed to disclose material facts which, if known to consumers, would be likely to affect their consideration of whether or not to purchase, and how to properly use, such products. Therefore, advertisements, promotional materials, acts or practices, which fail to disclose the aforesaid material facts, are unfair or deceptive.

PAR. 10. Respondent has made statements and representations, alone or in cooperation with others, orally or in writing, which appear in advertisements in print or broadcast media, in promotional material, or by other means, which do not delineate the circumstances and conditions under which they are not universally accurate and do not define the objects of comparison when they are phrased in comparative terms. Such statements and representations have the capacity and tendency to mislead consumers regarding the safety or efficacy of the products.

Therefore, the advertisements, promotional material, acts or practices which contain such statements or representations are deceptive or unfair.

PAR. 11. In the course and conduct of its business as aforesaid and at

all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insecticide products of the same general kind and nature.

PAR. 12. The use by respondent of the said deceptive or unfair advertisements, acts or practices has had, and now has, a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true and induce them into the purchase of substantial quantities of Furadan, Thiodan, Ethion, Sinox, Polyram, and other pesticide products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair or deceptive acts or practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent FMC Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State

of Delaware, with its principal office and place of business located at 200 E. Randolph Dr., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent, FMC Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, department or other device, in connection with the advertising, offering for sale, or sale or distribution of any pesticide product with precautionary labeling which contains any active pesticidal ingredient(s) presently marketed by respondent or currently being field tested by respondent and which is intended for use by custom applicators and commercial growers to protect animals or food, forage, field or fiber crops by virtue of the capacity of its active ingredient(s) to kill pests (sometimes referred to hereinafter as "such products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely or unqualifiedly safe, non-toxic or free of hazard for any use registered under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereinafter FIFRA) or any other approved use based upon evidence filed in connection with registration under FIFRA.

Provided, however, That for purposes of enforcing Paragraph I A of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed a violation of this order; *Provided, further*, That this exception shall be effective only until such time as a trade regulation rule covering the advertising and promotion of such products subject to this order and containing terms at least as onerous as Paragraph I A of this order becomes final and effective.

II

With respect to representations not covered by the provisions of Section I of this order, *It is ordered*, That FMC Corporation, a

corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, department or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely safe, non-toxic or free of hazard to human beings, warm-blooded animals, birds, fish, beneficial insects, or the environment.

III

It is further ordered, That respondent, FMC Corporation, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, department or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from disseminating or causing the dissemination of:

A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertising or print promotional material the following statement:

STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

B. Any broadcast advertisement more than 30 seconds in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

C. Any broadcast advertisement of 30 seconds or less in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL. READ THE LABEL USE AS DIRECTED.

Provided, That in television advertisements of 10 seconds or less in

length for any such products which contain no direct representations concerning product safety, the requirements of the term "clearly and conspicuously" shall in all cases be met by including the above statement in the video portion of the advertisement.

Provided, however, That for purposes of enforcing Paragraph III of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed sufficient to require the disclosure of any statement otherwise required under the provisions of Paragraph III; *Provided, further,* That this exception shall be limited to advertisements which promote the respondent's corporate image, which only incidentally promote the sale or distribution of such products and which are published or disseminated for publication by respondent's corporate headquarters' offices in conjunction with respondent's other nonpesticide products.

IV

Nothing in this order shall be construed to apply to scientific articles published in recognized scientific or agricultural journals or government publications, or reprints thereof, or representations (other than print advertising or other promotional material) before public or governmental forums such as public hearings, scientific meetings, or to governmental agencies, agents, or employees responsible for the regulation, testing, or dissemination of information concerning pesticide products covered by this order.

V

It is further ordered, That nothing in this order shall prohibit the dissemination of product labels (as defined by Section 2(p)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended), or reproductions thereof.

VI

It is further ordered, That should the Federal Trade Commission promulgate a trade regulation rule or industry guide governing the advertising or promotion of products subject to this order, then any pertinent less comprehensive or less restrictive provisions of such rule or guide shall automatically replace any comparable provisions set forth herein which are effective on the date that such rule or guide becomes final and effective.

VII

It is further ordered, That the respondent forthwith distribute a copy of this order to each of the operating departments of respondent's agricultural chemical division and any other operating division engaged in the manufacture, sale, advertising, promotion or distribution of products subject to this order, and to all present and future employees of such operating divisions responsible for the advertising, promotion, distribution or sale of such products.

VIII

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of this order.

IX

It is further ordered, That respondent corporation shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the provisions of this order.

X

It is further ordered, That this order shall become effective upon service.